



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Allstates Air Cargo, Inc.

File: B-261266; B-261266.2

Date: February 29, 1996

DIGEST

A Department of Defense guaranteed traffic tender provided that payment of the full amount of the charges required the carrier to deliver by the desired delivery date. It also provided that normal delivery service was Monday through Saturday no later than 5 p.m., and included a reduced payment for late deliveries. However, some destination installations stopped receiving shipments prior to 5 p.m., and the carrier documented instances in which a receiving installation closed prior to 5 p.m. Because the tender specifically stated that delivery by 5 p.m. was timely, the carrier's delay in delivery is excusable, and the full amount of charges are payable, if the carrier can clearly demonstrate that it would have delivered a particular shipment by 5 p.m. on a given day, but it was prevented from doing so solely because of the receiving office's closure prior to that time. The carrier's proof should adhere to the requirements contained in the records procedure.

DECISION

Allstates Air Cargo, Inc. (Allstates), an air freight forwarder, requests review of the General Services Administration's (GSA) disallowance of its claims for reimbursement for amounts set off by GSA for overcharges on various government bill of lading transactions.¹ GSA asserted overcharges on these shipments, concluding that the tender's low rate applied when Allstates failed to meet the tender's requirement of timely delivery. Allstates contends that it attempted delivery of each shipment on the desired delivery date (DDD), but it was unable to accomplish delivery because, in each instance, the destination installation had closed prior to 5 p.m. We reverse GSA's settlements and remand this matter to GSA to await further proof from Allstates to support its claims.

¹The carrier provided detailed documentation on six sample transactions: C-4,183,652, C-4,191,791, C-4,195,746, C-4,197,507, C-4,200,637, and C-4,200,960.

In 1992, the Military Traffic Management Command (MTMC) awarded Allstates Freight All Kinds² guaranteed traffic³ from the Defense Depot in Columbus, Ohio, to various points in the continental United States. The terms and conditions of the agreement between Allstates and the Department of Defense (DOD) were drafted and controlled by MTMC, and were contained in tender 600,005. Item 32 of tender 600,005 provided, among other things, that Allstates agreed to charges at a rate of 50 percent of the rate offered by it if "a shipment is not delivered to the consignee's address consistent with the desired delivery date shown on the bill of lading and/or shipping manifest." Additionally, item 26d provided that normal delivery service was Monday through Saturday "no later than 5 p.m."

GSA contends that Allstates made regular deliveries to the destinations involved, and it was well aware of the shipping and receiving hours. GSA does not believe that item 26d required a receiving installation to remain open until 5 p.m. to receive shipments, and it says that "it merely establishes reasonable guidelines for service requirements."

Allstates points out that it could have been removed from the contract if on-time deliveries fell short of 95 percent of the covered shipments. It notes that the Defense Depot in Columbus, the shipper, did not consider its service unsatisfactory with respect to the transactions in dispute. The record does not contain any evidence, as required by item 33d, that the shipper notified Allstates of a service failure or notify it that it intended to remove Allstates due to such a failure.

Allstates also directs our attention to item 29d which states that if the consignee is unable to accept a shipment through no fault of the carrier, the carrier will annotate the delivery receipt with the time/date consignee was notified that the shipment was available and the person and telephone number of the person who declined delivery. Allstates prepared documents noting the date of each attempted delivery, depot personnel with whom it made contact, and the actual dates of delivery.

²Freight All Kinds under this tender generally included all types of commodities except Class A and B Explosives.

³Under the Guaranteed Traffic program MTMC issues a request for rate tenders which provides for award to the responsive, responsible carrier whose offer is most advantageous to the government, cost and other factors considered, for all the traffic for a particular route for a specific period of time. MTMC awards what is in effect a requirements contract to the successful carrier. See Federal Transport, Inc.-Request for Reconsideration, 68 Comp. Gen. 451 (1989).

After reviewing the matter, MTMC agreed with Allstates saying that the carrier submitted the necessary documentation to support its claim with respect to the GBLs in question. MTMC acknowledges that the different depot destinations had different receiving times, and concludes that the carrier should not be penalized for the irregular and sporadic receiving times involved.

We reviewed the sample of six transactions that Allstates submitted to us with its May 23, 1995, request for review. They involve shipment dates from March 1993 to August 1993. In each instance, Allstates provided, on a computer printout sheet entitled "Weekly Suspended Proof of Deliveries,"⁴ the name and telephone number of the DOD employee it contacted and, it recorded, among other things, the day it offered the shipment and the time it was informed that the receiving office would close.⁵

We reverse GSA's settlements and remand this matter to GSA. We agree with Allstates' and MTMC's interpretation that Allstates should not be penalized for deliveries it can show it attempted prior to 5 p.m. on specified dates of delivery. We also conclude, however, that the carrier should support its claims with further documentation.

By its terms, tender 600,005, which was drafted by MTMC, clearly indicated that delivery by 5 p.m. was timely. MTMC could have required Allstates to deliver prior to the close of each destination installation's time for receipt of shipments, but it did not do so. Given the tender's substantial reduction in payment for untimely delivery, weight must be given to the conduct of the parties in adhering to the arrangement to which they each agreed: "In any kind of contract, if the right of one party to compensation is conditional upon the rendition of some service . . . by him . . . it is nearly always a breach of contract for the other party to act so as to prevent or to hinder and delay or make more expensive the performance of the condition." 3 CORBIN ON CONTRACTS 571 (1960). Compare Brand S Roofing, ASBCA 24688, 82-1 BCA ¶ 15,513, at 5067 (1981).

⁴Under item 29a of tender 600,005, the carrier is required to complete and return weekly proof of delivery reports to determine performance.

⁵In GBL transaction C-4,183,652, for example, the printout includes the date shipped (075), the DDD (076), the date delivered (077), the date offered (076), the person contacted ("closes 1500 Miram") and the phone number (919-466-8309). The date delivered, the offered date, the person contacted and the phone number, are handwritten entries.

Accordingly, if Allstates can demonstrate that it would have delivered a particular shipment by 5 p.m. on a given day, but was prevented from doing so solely because of the receiving office's closure prior to that time, the delay is excusable.

We agree with GSA, however, that Allstates may not have met its burden to offer proof in each instance that the untimely delivery was not the carrier's fault. Tender 600,005 is specific about the records the carrier must maintain to justify an excusable delay. As stated above, when the consignee was unable to accept the shipment through no fault of the carrier, item 29d required the carrier to provide a delivery receipt with the time/date consignee was notified that the shipment was available and the person and telephone number of the individual who declined delivery. While the item 29a weekly printouts contained the name and telephone number of the person who declined the shipment, and the date on which it was declined, they do not indicate the time of the declination. The remark "closes 1500" does not reasonably suggest that Allstates notified the consignee at 1500 (3 p.m.); it suggests that receipt of shipments stopped at 3 p.m. Time of notification is a material issue of fact.

Furthermore, Allstates' item 29a printouts are not delivery receipts. The reason for the drafter's choice of the term "delivery receipt" is not clear, but it suggests that he or she contemplated a device that would have rapidly alerted the agency that the carrier had attempted delivery on a prior day but that a specific person had refused it.

Allstates contends that the shipper did not object to its on-time delivery record with respect to these shipments, and it suggests that this is evidence that each delay was excusable. While we agree that this is some evidence that the delays were excusable, we believe that Allstates should comply with the requirements of item 29d before it can shift the burden of proof to the government. GSA, as the auditor, should be able to review the records required by item 29d, and Allstates must provide it proof about the time of notification, before GSA can determine whether the delay was excusable.

We remand this matter to GSA for further consideration.

/s/Seymour Efros
for Robert P. Murphy
General Counsel